Supreme Court of the United States.

OCTOBER TERM, 1950.

No. 419.

MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED, AND HARRY J. ALKER, JR.,

Petitioners, and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION (NOW TO THE USE OF SECRETARY OF BANKING, COMMONWEALTH OF PENNSYLVANIA, RECEIVER OF INTEGRITY TRUST COMPANY),

Respondent and Appellee Below.

BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit which is sought to be reviewed is reported in 183 F. (2d) 429.

Earlier opinions in the same case are reported at:

151 F. (2d) 907
163 F. (2d) 123
164 F. (2d) 469
169 F. (2d) 336.

JURISDICTION.

Petitioners rely on 28 U. S. Code 1254.

STATEMENT OF THE CASE.

This is the fourth petition for certiorari in this case, and (counting petitions for rehearing), the thirteenth application to this court. All have been denied.

327 U. S. 799
328 U. S. 877
328 U. S. 879
328 U. S. 881
329 U. S. 823
329 U. S. 830
334 U. S. 827
334 U. S. 862
335 U. S. 838
335 U. S. 864
335 U. S. 894
336 U. S. 953

The petitioners' Statement of the Case (which contains no record references) reiterates the averments in previous petitions, including a number of erroneous statements. The actual facts are set out in the opinions of the court below.

The present phase of the case is another effort to open the judgment against Alker which the Court of Appeals has several times refused to do. The disposition of the current petition for certiorari does not require a repetition of all the facts set out in the answers to the three earlier petitions.

Docket 10,002.

On November 8, 1944, Federal Deposit Insurance Corporation entered a judgment against defendant Alker, based on a note he had given to Integrity Trust Company of Philadelphia. This judgment was affirmed by the Circuit Court of Appeals. Alker made many efforts to open the judgment on the basis of alleged after-discovered evidence, the pendency of a bill in Congress and other grounds, all of which were rejected by the Court of Appeals.

On July 30, 1948 the mandate went down from the Court of Appeals to the District Court, which ordered that the prayer "for leave to file a bill in the nature of a bill of review in the court below or to give the court below authority to rehear a motion for a new trial be and same

hereby is denied'' and commanded that proceedings be had in the District Court ''in conformity with the opinion and judgment of this court'' (636a).

On March 3, 1949 District Judge Welsh entered an order for a new trial.

Plaintiff applied to the Court of Appeals for a writ of mandamus to compel obedience to the mandate. Plaintiff also appealed.

In answer to the Rule issued by the Court of Appeals Judge Welsh stated, in effect, that the new trial had been ordered under a misapprehension. He said:

> ''Since the granting of the new trial and the service of citation by your Honorable Court, further study and research have been made of the record and the law applicable, and the Court is of the opinion that the law of this case has been fixed by the Opinions filed and that the repeal of Section 12B(s) of the Federal Reserve Act does not constitute a legislative change which would affect the disposition of the issues heretofore determined. We are, therefore, of the opinion that the Order for new trial should be vacated and that upon the disposition of the present pending appeal therefrom in your Honorable Court our Order should be entered accordingly.''

On May 2, 1949 at the argument in the Court of Appeals on the petition for a writ of Mandamus the Court indicated from the bench that it would issue the writ but desired to give the District Court an opportunity to vacate the order for a new trial.

FDIC, which had appealed from the order granting a new trial (650a) thereupon applied to the District Court for leave to dismiss the appeal (651a) which was granted (9a). At the same time it applied to the District Court for an order vacating the order granting a new trial and dismissing defendant's motions for a new trial (652a).

On May 9, 1949 Judge Kirkpatrick (in the absence of Judge Welsh, who was then in Europe) granted the motion and entered an order dismissing defendant's motions for new trial (658a). This is the order appealed from in number 10,002.

Docket 10,015.

In the meantime the loan of FDIC to Integrity Trust Company had been repaid in full, and the remaining assets, including the Alker judgment, had been transferred to Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company. FDIC on July 28, 1948 moved the District Court to substitute the Secretary for it as party plaintiff (633a).

Such an order of substitution was made on June 14, 1949, after an appeal had been taken in 10,002. This is the order appealed from in 10,015.

Docket 10,120.

On October 26, 1949, plaintiff moved to revive the judgment. The District Court did not act on the motion, but did direct its clerk to note the pendency of the motion on the judgment index. This is the order appealed from in No. 10,120.

The Court of Appeals affirmed in numbers 10,002 and 10,120 and reversed in number 10,015.

After the mandate went down to the District Court, on September 7, 1950, FDIC marked this case to the use of the Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company.

The Receiver thereupon filed four motions in the District Court for the revival of the judgment, examination of the debtor, judgment against a garnishee, and discovery in aid of the latter. All of these are now pending in the District Court.

Thereafter defendant filed this petition for certiorari. This Brief in Opposition is filed by the Receiver, because the FDIC no longer has an interest in the judgment.

ARGUMENT.

The mere statement of the case shows that it presents no question of substance or general importance. Indeed, one doubts that the annals of this Court disclose any other effort to ask this court to review so trivial a matter as a Judge's instruction to his clerk concerning the book in which to index the pendency of a motion; yet this is all that is involved in number 10,120.

The petitioner's suggestion that the Court of Appeals went outside of the record in number 10,002 is without substance. When the Court of Appeals issued its Rule to Show Cause why a writ of mandamus should not issue, the Rule was directed to Judge Welsh and all the other District Court Judges and was lodged in the District Court (646a). Judge Welsh's answer which was made on his own behalf and that of all the judges was lodged in the Court of Appeals. The appellant printed the Rule but not the Answer as part of his appendix on appeal; the appellee printed the Answer as part of his appendix. Both Judge Kirkpatrick and the Court of Appeals took cognizance of Judge Welsh's frank avowal that an error had been made in the matter of granting a new trial; no doubt they would have corrected the error whether or not it had been acknowledged. Clearly neither Court has gone outside the record.

It is submitted that the decision of the Court of Appeals in numbers 10,002 and 10,120 was sound and correct, that the petition for certiorari discloses no questions of substance or general importance, and that this petition should be denied.

ALLEN S. OLMSTED, 2ND,
EDWIN C. EMHARDT,
Attorneys for Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company, Use-Plaintiff.